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NO. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY
AND SHIRLEY ELISER,

Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON,
PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON,
LARRY S. RICHARDSON, CARLA RICHARDSON, AND
JUNE G. ALLEN,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF BY RESPONDENTS

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BRIEF BY RESPONDENTS TO PETITION FOR CERTIORARI

The respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, plaintiffs-appellants below, respectfully urge that petitioners', Foremost Insurance Company and Shirley Eliser's, application for writ of certiorari to review the judgment of the U. S. Court of Appeals for the Fifth Circuit entered in the case on April 2, 1981, be denied.

STATEMENT OF THE CASE

For the sake of brevity, we adopt petitioners' statement of the case with the following exceptions or additions:

A. The collision occurred between two pleasure vehicles, one southbound and the other northbound, when, upon meeting in the river, one or both operators turned their respective boats to their left and toward each other instead of outward toward the banks of the river.

B. The collision occurred on a navigable body of water, the Amite River, at a point susceptible to commerce albeit seldom used for commercial activities.

REASONS FOR DENYING THE WRIT

When a collision occurs between two pleasure boats on navigable water susceptible to commerce and said collision results from the negligent operation of the boat or boats by the pilot or pilots in failing to observe established navigational rules and standards, then the admiralty jurisdiction of the Federal Courts should be invoked. This conclusion was reached by the United States Court of Appeals for the Fifth Circuit

and supported by the following reasons, which clearly establish the correctness of said Court's decision and the lack of necessity to grant petitioner's writ of certiorari.

I.

THE FIFTH CIRCUIT COURT OF APPEAL'S DECISION IS WITHIN THE SCOPE OF ADMIRALTY JURISDICTION AS JURISPRUDENTIALLY DEFINED.

There is no need to grand a writ of certiorari to review the decision of the Fifth Circuit Court of Appeal since that Court followed very carefully the principles expounded by this Court in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The Fifth Circuit recognized that maritime locality alone is no longer sufficient to sustain admiralty jurisdiction and that the wrong must bear a significant relationship to traditional maritime activities. The Court correctly applied the facts of this case to said test in upholding admiralty jurisdiction, which holding does not distort traditional concepts of the scope of admiralty jurisdiction.

Counsel for petitioners seeks to have the Court define "maritime nexus" as commercial conduct (petitioners' brief, p. 20). This view would place a much greater restriction on admiralty jurisdiction than mandated by Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, supra.

This Court, in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), clearly connected the traditional maritime activities of admiralty with proper regard for navigational rules when he stated as follows (p. 270):

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shore they cannot go. That law deals with navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe."

The use of a waterborne vessel on navigable waters presents a case falling within the historical scope and design of the law of admiralty. Levinson v. Deupree, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914 (1963); Just v. Chambers, 312 U.S. 383, 85 L.Ed. 903,

61 S.Ct. 687 (1941); Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943). There is thus established precedent extending admiralty jurisdiction to pleasure boat litigation not disturbed by later decisions of this Court.

The facts presently before this Court go beyond the historical precedent in establishing a much stronger relationship to traditional maritime activities. Those facts undisputedly reveal that a collision occurred on navigable water, the Amite River, which river was indeed susceptible to commercial activity on the day and at the location of the collision. Further, although the collision occurred between two pleasure boats, it was directly caused by one or both pilots of said pleasure boats failing to observe uniformly established "Rules of the Road" for navigation on water bodies by all vessels, commercial or otherwise. The Fifth Circuit in the case of Kelly v. Smith, 485 So.2d 520 (5th Cir. 1973) established four factors to be considered in determining the applicability of maritime jurisdiction in light of the Supreme Court case of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra). Those factors were as follows:

1. The function and role of the parties;
2. The types of vessels and instrumentalities involved;
3. The causation of the types of injury; and
4. The traditional concept of the role of admiralty law.

In the instant case, an analysis of these factors in light of the factual situation of this case reveals a clear nexus to traditional maritime activities. In regard to the functional rule of the parties, all were actively engaged in navigation of the vessels. Secondly, although both vessels were pleasure boats, no non-navigable vessels or instrumentalities were involved in the collision. Thirdly, the injuries complained of by all parties resulted from the disregard of rules for proper navigation. Lastly, admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters. See Kelly v. Smith, (supra); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

There is a compelling federal interest in protecting navigation and commerce on navigable waters establishing a significant relationship to traditional

maritime activities. The Fifth Circuit is not alone in its recognition of this principle. Other circuits and federal district courts are in accord. In Oppen v. Aetna Insurance Co., 485 F.2d 262 (9th Cir. 1973), damage by an oil spill in the Santa Barbara Channel to a pleasure boat was cognizant in admiralty jurisdiction. The Fourth Circuit in Richards v. Blake Builders Supply, 528 F.2d 745 (4th Cir. 1975) held that the negligent claim of a plesure boat passenger was cognizable in admiralty. In Kayfetz v. Walker, 404 Fed. 75 (D.C. Conn. 1975), the Court upheld admiralty jurisdiction where the injuries complained of arose out of a collision between two sailing yachts during a race, which also resulted from disregard of the rules of proper navigation. The district court in Gilmore v. Witschorek, 411 F.Supp. 491 (E.D. Ill. 1976) also held that federal admiralty jurisdiction encompassed a collision between two pleasure boats on navigable water in a wrongful death claim. Finally, in Luna v. Star of India, 356 F.Supp. 59 (S.D. Cal. 1973), an accident occurring on a historic vessel used as a museum established a sufficient relationship to traditional maritime activities to invoke federal court admiralty jurisdiction.

It is suggested that the proper focus of the maritime law should be upon waterborne vessels, pleasure or otherwise, rather than upon waterborne commerce alone. This is true because there is a federal interest in protecting navigation and commerce on navigable waters since waterborne vessels, whether commercial or non-commercial, clearly create a potential threat to navigation and commerce. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Maryland L.R., p. 225.

II.

THE FIFTH CIRCUIT DECISION PROMOTES COMMERCE AND SAFE NAVIGATION THROUGH UNIFORMITY OF NAVIGATIONAL RULES AND MAKES THE JURISDICTION READILY ASCERTAINABLE TO LITIGANTS AND COURTS.

In addition to a nexus existing between traditional concepts of maritime activities in a collision involving failure to apply proper navigational rules, policy consideration militates toward upholding admiralty jurisdiction in the present case. This policy stems from the national interest in uniformity of navigational laws and judicial remedy for those subjected to the hazards of waterbound transportation

on our navigable rivers — the "highways of admiralty." As stated most clearly in the case of St. Hilaire Moye v. Henderson, (supra), p. 979:

> "The navigation of waterbound vessels on those waters, even if not directly engaged in commerce themselves, present a potential danger to the operation of vessels which are engaged in commerce on those waters. This is the very basis of law requiring vessels used on navigable waters to meet certain safety and operational standards. The law of admiralty must surely cover the operation of vessels which present potential danger to commerce on navigable waters."

Federal law has for many years subjected pleasure craft to statutory navigational and safety rules. 1 U.S.C. §3 (1970); 33 U.S.C. §§151-232 (1957); 33 U.S.C. §§241-295 (1958); 33 U.S.C. §§302-356 (1958); and 46 U.S.C. §526 (1940). The enactment of these laws and their applicability to all types of vessels show a need for uniformity of said rules on all navigable waterways for the enhancement of commerce as recognized by Congress. The exclusion of pleasure boats from admiralty tort jurisdiction while keeping said boats under federal navigational rules would frustrate a recognized federal policy and federal interest in protection of navigation on navigable

waters. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 229.

If all collisions between vessels on navigable waters are held to be within admiralty jurisdiction, then uniformity of navigational rules is guaranteed and commerce is unimpeded. Without the same uniformity of law for all vessels, each individual state would be free to regulate its own rules, which could conflict with federal navigational laws.

If this Court were to believe petitioners and establish the requirement that in order for admiralty jurisdiction to be invoked a commercial vessel must be involved in the collision, all types of conflicts and uncertainties could arise. For collisions involving non-commercial navigators, there would be fifty different sets of navigational rules whose applicability would depend upon the location of said vehicle in reference to the territorial jurisdiction of each state within the United States. There could be different sets of navigational rules for such non-commercial vessels on the same navigable bodies, i.e., the Mississippi River, depending upon what state you happen to be in at the time of the mishap.

With different rules for commercial vessels (federal rules) as opposed to non-commercial vessels (state rules), it might not be readily ascertainable prior to the collision as to the exact nature of each vessel's activities, commercial or pleasure, and thus what proper navigational rules would govern the situation. Havoc would result. The correct rule of navigation would not be applied by the parties prior to a collision in an effort to avoid same but would be applied only upon a determination by the court at trial after the collision as to whether such vessel's activities later turned out to be sufficiently commercial so as to involve a federal navigational rule or purely pleasurable, thus invoking state rules of navigation. In order to keep the roads of admiralty free for commerce without restraint, it is imperative that uniform admiralty law extend to non-commercial as well as to commercial navigators.

Even Professor Stoltz, who is quoted extensively by petitioners in the application for writ of certiorari, recognized the need for uniformity in navigational rules when he stated as follows regarding the scope of admiralty jurisdiction:

> "Clearly a federal interest exists with respect to such matters as the rules of navigation, right-of-way, and lights to be carried, which must necessarily control both big ships and little boats and as to which there is a clear virtue in national uniformity."

Pleasure Boating and Admiralty: Erie At Sea, 51 Cal. L.R., p. 663.

> "The easiest case for an application of federal law to pleasure boating involves the Rules of the Road: such as rules of passing and turning, rules of right-of-way, and rules concerning running lights. By the terms of a federal statute, these rules are applicable to all vessels on navigable waters, and the rules of must of necessity be applicable to pleasure boats. It would be intolerable to have conflicting rules on any particular body of water."

Pleasure Boating and Admiralty: Erie At Sea, 51 Cal. L.R., pp. 712-713.

Although the facts of this case do not establish clearly whether the Amite River was being used in commerce on the date of the collision and at the point of collision, said factors should not affect the Court's determination of admiralty jurisdiction, provided the waterway, as here, is admittedly susceptible to commerce. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870).

As stated by the Fifth Circuit in its decision (J.A. "A" - 6A), it would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to stretches of navigable water that presently functions as a commercial artery. It would place too great a burden on pilots of navigable bodies to ascertain commercial activities at each point during navigation. Without this determination under such a rule and with difference between state navigation rules and the admiralty "Rules of the Road," the correct navigable rule would again be resolved only in court after litigation, which would produce absolute chaos for said pilots and would place additional restraints on commercial activities.

> "It would be highly inconsistent to have created a separate body of law for maritime commerce in order to provide uniformity and predictability for its legal affairs because those affairs are primarily interstate and international, and at the same time exclude vessels having the same extent of operations simply because those operations are not for profit."

Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 278.

CONCLUSION

There is no necessity that a writ of certiorari be granted. The Fifth Circuit Court of Appeals' decision upholding admiralty jurisdiction in this case does not stretch or distort long-established principles of maritime law. The admiralty law has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters. In addition, policy consideration of uniformity of navigational laws for all vessels facing the hazards of the roads of admiralty and policy assuring a readily ascertainable jurisdiction militates toward upholding admiralty jurisdiction for all vessels colliding on navigable waters which are susceptible to commerce. Petitioners' application for writ of certiorari should be denied.

In the alternative, this Court should issue a summary opinion upholding the Fifth Circuit's decision in accordance with law and with the rules of the Supreme Court of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on the Honorable Howell Andrews, P. O. Box 3958, Baton Rouge, LA 70821, counsel of record for petitioners, Foremost Insurance Company and Shirley Eliser, and on the Honorable Victor Marcello, P. O. Drawer 669, Donaldsonville, LA 70346, counsel of record for June G. Allen, by depositing said copies in the United States mail, postage prepaid and properly addressed, on this 14th day of September, 1981.

DORSEY C. MARTIN, III